IN THE SUPREME COURT OF THE STATE OF NEVADA

PANIX PROMOTIONS, LTD., A FOREIGN CORPORATION; AND BANNER PROMOTIONS, INC., A DELAWARE CORPORATION,
Appellants/Cross-Respondents,
vs.
DON KING PRODUCTIONS, INC., A DELAWARE CORPORATION,
Respondent/Cross-Appellant.

No. 46688

FILED

NOV 05 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal and cross-appeal from a district court judgment after a bench trial, certified as final under NRCP 54(b), in a contract and tort action. Eighth Judicial District Court, Clark County; David Wall, Judge.

In this case, appellants/cross-respondents Panix Promotions, Ltd., and Banner Promotions, Inc. (Panix), and respondent/cross-appellant Don King Productions, Inc. (DKP), both boxing promoters, contest the promotional rights to professional boxer and former heavyweight champion John Ruiz. Specifically, a dispute between the promoters over an alleged co-promotional arrangement concerning Ruiz resulted in the filing of the underlying action. However, instead of asserting a claim based upon a breach of the co-promotional arrangement between the promoters, Panix sought and recovered damages based on a theory of unjust enrichment. While unjust enrichment damages are generally not available when an express contract exists and a party fails to bring a claim for breach of contract, the defendant must nonetheless assert an affirmative defense stating that the plaintiff is barred from bringing an unjust enrichment claim given the circumstances. Because DKP failed to

assert such an affirmative defense here, we affirm the district court's award of damages.

FACTS AND PROCEDURAL HISTORY

In 1996, Panix signed an exclusive "Bout Agreement" with Ruiz for a term of 18 months, commencing January 14, 1997. The Bout Agreement granted Panix the exclusive right to promote Ruiz and stated that he was not permitted to contract with any other promoters during the term of the agreement without Panix's written permission. In addition, Panix had the right under the Bout Agreement to promote three boxing matches. It had promoted two of the three bouts covered under the Bout Agreement when, in May 1998, Ruiz signed a separate "Promotional Agreement" with DKP.[1] The Promotional Agreement contained an assignment clause that permitted DKP to assign the net profits of Ruiz's bouts to Panix.

Panix claims that the new Promotional Agreement was the result of a separate oral agreement between Panix and DKP, in which Panix agreed to forego its exclusive rights under the Bout Agreement to promote the remaining third bout and to negotiate with Ruiz for another exclusive promotional arrangement. According to Panix, it conferred on DKP the right to negotiate a new co-promotional agreement directly with Ruiz under which Panix and DKP would evenly split the net proceeds. Panix asserts that, instead of obtaining the promised co-promotional agreement, DKP used this opportunity to "hijack the fighter" by negotiating the exclusive Promotional Agreement with Ruiz, which only

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[1]Panix was not a party to the Promotional Agreement.

provided for a unilateral option in DKP to assign net profits to Panix. Panix further claims that DKP refused to exercise its option to assign any financial benefits to Panix, beyond a fixed sum for the third match that was contemplated under the original Bout Agreement between Panix and Ruiz.

DKP argues that Panix gave Ruiz written permission to contract with any promoter. While DKP concedes that it agreed to negotiate for a joint promotional agreement under which Panix and DKP would co-promote the fighter and that DKP attempted to do so, DKP claimed at trial that Ruiz refused such an arrangement but did agree to allow DKP to assign certain rights to Panix. More particularly, DKP claimed that Ruiz would not sign a new co-promotional agreement involving Panix and that negotiations attempting to finalize such an agreement had failed. DKP further maintains that even if an oral agreement to obtain a co-promotional agreement existed as Panix claims, the oral agreement was contingent upon the creation of a joint co-promotional agency to be called "KingPan."[2]

After DKP refused to pay 50 percent of the net profits resulting from the Promotional Agreement, Panix filed this action against DKP for conspiracy, interference with contractual relations, interference with prospective economic advantage, and unjust enrichment. Interestingly, the complaint failed to include a claim for breach of the oral

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[2]We note that the record contains a letter from DKP's counsel to Panix indicating that the Promotional Agreement would "be assigned to King Pan or whatever other company we create upon its formation." This letter does not condition the future co-promotion of Ruiz on the formation of KingPan any other entity.

contract between Panix and DKP to allow DKP to negotiate directly with Ruiz before the expiration of the original Bout Agreement. The district court subsequently twice denied motions by Panix to amend its complaint to include such a breach of contract claim.[3]

DKP asserted a number of affirmative defenses against Panix. Among its affirmative defenses, DKP asserted that Panix failed to state a claim upon which relief could be granted, Panix's claims were barred by the doctrine of estoppel, Panix waived its right to assert the claims set forth in the complaint, and Panix's claims were barred by the statute of limitations. However, DKP did not assert an affirmative defense stating that DKP could not bring an unjust enrichment claim because an express oral contract existed between Panix and DKP.

After a bench trial, the district court awarded Panix approximately $2.7 million in damages on its unjust enrichment claim.[4] The district court found, in evaluating Panix's claim for interference with prospective economic advantage, that "there was an agreement between . . . PANIX and . . . DKP on May 9, 1998, to create a new co-promotional agreement to promote RUIZ, fifty percent for the benefit of DKP and fifty percent for the benefit of . . . PANIX." It further found that, in agreeing to allow DKP to negotiate a new co-promotional agreement, Panix agreed to

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[3]Panix does not challenge the district court's denial of the motions to amend in this appeal.

[4]The district court initially awarded Panix $5,358,657 but reduced the amount by half to $2,679,318.50.

give up the right to promote the third bout as well as the exclusive right to promote Ruiz under the remainder of the Bout Agreement.[5]

With respect to Panix's unjust enrichment claim, the district court found that Panix conferred a benefit on DKP by allowing DKP to "enter into an agreement with RUIZ . . . before the expiration of the exclusive contractual period contained in the December, 1996 Agreement." The district court further found that Panix would not have conferred the benefit on DKP if it had not expected to receive 50 percent of the net profits from the promotion of Ruiz under the Promotional Agreement and that "there was agreement between . . . DKP and . . . PANIX that the new agreement with RUIZ . . . would be a co-promotional agreement with. . . PANIX to receive fifty percent (50%) of the net profits of such co-promotional agreement regarding RUIZ." On that basis, the district court found that it was inequitable for DKP to retain 100 percent of the net profits from the Promotional Agreement and awarded Panix 50 percent of the net profits generated from the exclusive DKP Promotional Agreement with Ruiz. Panix now appeals the damage amount as inadequate. DKP cross-appeals the district court's award of unjust enrichment damages.

We now affirm the district court's finding of unjust enrichment and its award of $2.7 million in damages to Panix.

DISCUSSION

Standard of review

It is well-established that "[a] district court's [factual] findings will not be disturbed on appeal unless they are clearly erroneous and are

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[5]While this agreement may have been enforceable, as noted, Panix chose not to bring suit on this claim in its original pleadings.

not based on substantial evidence."[6] Accordingly, we review the district court's factual findings under a "clearly erroneous" standard.

Unjust enrichment

DKP contends that unjust enrichment, a "quasi-contractual" remedy, i.e., a remedy based on a contract implied in law, is unavailable when an express contract covers the subject matter of the unjust enrichment claim. This is based upon the general notion that the law does not imply an express contract. More specifically, DKP argues that the district court could not find the existence of a contract, bar recovery on that claim by refusing the motions to amend, and then award unjust enrichment damages as a substitute for the barred contract claim.

Recently, in Clark County School District v. Richardson,[7] we explained when affirmative defenses must be pled. Specifically, we stated:

> NRCP 8(c) states which defenses a party a party must plead affirmatively. Specifically, a party must affirmatively plead "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estopple, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, [and] waiver." The rule also provides a "catchall" that "any other matter constituting an avoidance or affirmative defense" must be set forth affirmatively.[8]

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[6]Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994).

[7]123 Nev. 39, 168 P.3d 87 (2007).

[8]Id. at ___, 168 P.3d at 94.

We set forth a test for determining whether an affirmative defense falls under the catchall provision of NRCP 8(c), stating that "allegations must be pleaded as affirmative defenses if they raise "new facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all allegations in the complaint are true.""[9] Further, "[u]nder NRCP 8(c), a defense that is not set forth affirmatively in a pleading is waived."[10] In Richardson, we determined that the statement that "claimed damages are barred because of . . . failure to fulfill conditions precedent to receiving additional payment under the contract" constituted an affirmative defense.[11]

We conclude that the unjustment enrichment issue that DKP raises in this case constitutes an affirmative defense under the test outlined in Richardson. Specifically, the argument that Panix's unjust enrichment claim was barred due to a failure to assert a breach of contract claim falls under the catchall affirmative defense portion of NRCP 8(c) because it would have defeated Panix's claim regardless of whether the facts set forth in the complaint were true. Accordingly, we conclude that DKP waived its right to assert the affirmative defense that DKP was barred from bringing an unjust enrichment claim because it did not bring a timely breach of contract claim. We therefore also conclude that the district court properly found for Panix on its unjust enrichment claim.[12]

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[9]Id.

[10]Id. at ___, 168 P.3d at 96.

[11]Id. at ___, 168 P.3d at 94.

[12]We note that none of DKP's affirmative defenses were pled with sufficient particularity to convey the argument that Panix was barred from bringing an unjust enrichment claim because it did not assert a

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Value of the benefit

DKP contends that even if Panix was entitled to recover in unjust enrichment, Panix could only recover the reasonable value of the benefit DKP received from Panix and not "an unrealized contract expectancy." In this, DKP argues that the only benefit that Panix conferred on DKP was the right to promote the third bout under the Bout Agreement and that, even if there was an unjust enrichment, the value of the benefit was approximately $30,000, not the approximately $2.7 million that the district court awarded in damages. DKP further asserts that Panix had nothing more than a mere expectancy of promoting any fights after the end of the Bout Agreement. As a result, DKP claims that the district court committed reversible error by awarding Panix damages based on a mere contract expectancy and not unjust enrichment.

. . . continued

breach of contract claim. In this, we note that the affirmative defense in Richardson outlined above was stated with sufficient detail to make a coherent argument relating to the conditions precedent in the contract and we hold DKP to the same standard. Specifically, the affirmative defense DKP asserts that "[Panix] waived [its] right to assert the claims set forth in [its] Complaint" is not sufficiently detailed to constitute the required affirmative defense articulated above.

Moreover, it appears that DKP had good and sufficient reasons for not alleging the existence of the contract as an affirmative defense. Such an affirmative defence might have constituted grounds for allowing Panix leave to amend its complaint to include the claim in the alternative—a claim that could possibly generate a higher level of damages and would arguably have been easier to sustain at trial.

We disagree. Initially, Panix conferred two benefits on DKP: the right to promote the third bout under the Bout Agreement and the right to negotiate with Ruiz before the expiration of its exclusive promotional rights thereunder. Those benefits belonged to Panix under the terms of the Bout Agreement and not mere expectancies to promote fights after the Bout Agreement expired.

In addition, the two benefits had real value that exceeded the $30,000 figure that DKP cites. Specifically, while DKP is correct that it is improper to award contract expectancy damages for a claim of unjust enrichment, the value of the benefits conferred may, in certain circumstances, be equal or approximately equal to the amount that would have been awarded under a breach of contract action.[13] In this case, the agreement between Panix and DKP to split the net profits obtained from promoting Ruiz represented an attempt by the parties to place a value on the right to negotiate with Ruiz before the Bout Agreement had expired. Accordingly, the $2.7 million in damages that the district court awarded to Panix is sustainable, not because the parties agreed to such a figure in their agreement, but because the value of the benefits of promoting the third bout and negotiating with Ruiz before expiration of the Bout

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[13]See Flamingo Realty v. Midwest Development, 110 Nev. 984, 987-89 P.2d 69, 71-72 (1994) (holding that the agreed upon commission specified in the original, but unexecuted, contract constituted an important part of the analysis in determining the "reasonable value of the services" under a quantum meruit theory of recovery). We conclude that the approximately $2.7 million in damages that the district court awarded fall within the values dictated by ordinary custom and commercial reasonability.

Agreement reasonably amounted to $2.7 million under the expert testimony considered by the district court.

Damages

On appeal, Panix claims that it is entitled to 50 percent of the net profits of the six promotions in which Ruiz participated in the main event or the district court's original damage award.[14] We disagree. We will not disturb a district court's award of damages on appeal absent an abuse of discretion.[15] Here, the district court clearly adopted the damage calculation of DKPs expert over that of Panix's expert. In addition, Panix failed to provide any justification for using its expert's testimony. Accordingly, we conclude that the district court did not abuse its discretion in dividing the original damage award in half.[16]

CONCLUSION

For the foregoing reasons, we conclude that the district court properly found for Panix on the unjust enrichment claim and did not

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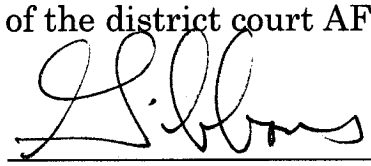
[14]The district court originally awarded Panix approximately $5.3 million, which it reduced to approximately $2.7 million.

[15]Flamingo Realty, 110 Nev. at 987, 879 P.2d at 71.

[16]It was appropriate for the district court to divide the $5.3 million in half as per the co-promotional agreement to ensure that Panix only received 50 percent of the proceeds. Accordingly, the $2.7 million damage figure was proper.

abuse its discretion in awarding Panix approximately $2.7 million in damages. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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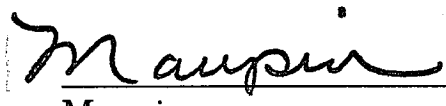

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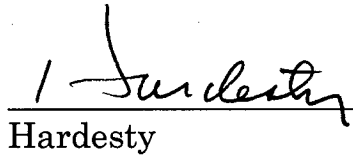

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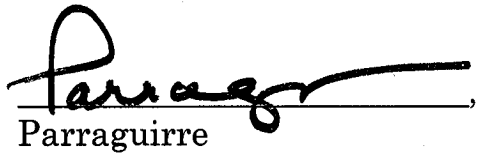

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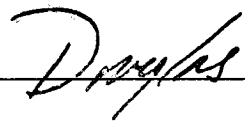

_____, J.
Douglas

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Cherry

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Saitta

cc: Hon. David Wall, District Judge
William C. Turner, Settlement Judge
Harry Paul Marquis
Lionel Sawyer & Collins/Las Vegas
Eighth District Court Clerk